



September 24, 2001

Ms. Bertha Bailey Whatley
Attorney
Fort Worth Independent School District
100 North University Drive, Suite NW 130
Fort Worth, Texas 76107

OR2001-4271

Dear Ms. Whatley:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 152304.

The Fort Worth Independent School District (the "district") received three requests for records relating to a named individual. The named individual is the client of the requestor in the requests dated April 20, 2001 (marked "Received May 2 2001") and May 2, 2001 (marked "Received June 5 2001"), which request "school/student records" and the individual's personnel file. The named individual is the requestor in the third request dated July 19, 2001, which requests "all documents legally accessible and pertaining to [the requestor], throughout the entire Fort Worth Independent School District" created on or after June 4, 2001, including closed board hearing minutes from the June 26th grievance hearings.

You indicate that the district has already released some responsive information regarding the first two requests. You claim that the submitted responsive information is excepted from disclosure under sections 551.104(c) and 552.131 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also considered comments submitted to this office by one of the requestors. Gov't Code §552.304.

Subsections 552.301(a) and (b) provide:

- (a) A governmental body that receives a written request for information that it wishes to withhold from public disclosure and that it considers to be within one of the [act's] exceptions . . . must ask for a decision from the attorney general about whether the information is within that exception if there has not

been a previous determination about whether the information falls within one of the exceptions.

(b) The governmental body must ask for the attorney general's decision and state the exceptions that apply within a reasonable time but not later than the 10th business day after the date of receiving the written request.

It appears from the documents submitted to this office that the department received the first two requests for information under the Public Information Act on May 2, 2001 and June 5, 2001. You did not request a decision from this office until July 20, 2001. Consequently, you failed to request a decision within the ten business day period mandated by section 552.301(a) of the Government Code. Because the request for a decision was not timely received, the requested information is presumed to be public information. Gov't Code § 552.302.¹

In order to overcome the presumption that the requested information is public information, a governmental body must provide compelling reasons why the information should not be disclosed. *Id.*; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.--Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); *see* Open Records Decision No. 630 (1994). You argue that section 552.131 of the Government Code will except the information at issue from public disclosure.² Section 552.135 (formerly §552.131) provides a compelling reason to overcome the presumption of openness.

Section 552.135 of the Government Code excepts certain information held by school districts from public disclosure. It reads as follows:

¹ A determination as to whether or not the informer's privilege is applicable must be made on a case-by-case basis. As this office has already informed you, your reliance on prior rulings as previous determinations in this case was in error. A previous determination is very narrow in scope. As Open Records Decision 673 explains, among the criteria for a valid previous determination is the requirement that the information at issue must be precisely the same information previously submitted to the attorney general. The information at issue in ORL 2000-4723, upon which you were relying, involved different individuals and a violation of a different regulatory provision than in the individuals and regulatory provision in the instant case. Thus, the law, facts, and circumstances were not the same in the instant case as in the previous one. You may not rely on a prior ruling regarding the informer's privilege under §552.135 unless the informer is the same person in each case, the possible violation of law is the same law in each case, and the information at issue in each case is the same.

²As of the date of your request, four different sections of the Act were denominated as section 552.131. Section 552.131, relating to school district informers, was added to chapter 552 of the Government Code by the Act of May 30, 1999, 76th Leg., R.S., ch.1335, §§6, 1999 Tex. Gen. Laws 4545. However, effective September 1, 2001, section 552.131 relating to school district informers will be renumbered as section 552.135. *See* Act of May 22, 2001, 77th Leg., R.S., H.B. 2812, § 21.001(54)] (codified at Gov't Code § 552.136).

(a) "Informer" means a student or former student or an employee or former employee of a school district who has furnished a report of another person's or persons' possible violation of criminal, civil, or regulatory law to the school district or the proper regulatory enforcement authority.

(b) An informer's name or information that would substantially reveal the identity of an informer is excepted from the requirements of Section 552.021.

(c) Subsection (b) does not apply:

(1) if the informer is a student or former student, and the student or former student, or the legal guardian, or spouse of the student or former student consents to disclosure of the student's or former student's name; or

(2) if the informer is an employee or former employee who consents to disclosure of the employee's or former employee's name; or

(3) if the informer planned, initiated, or participated in the possible violation.

(d) Information excepted under Subsection (b) may be made available to a law enforcement agency or prosecutor for official purposes of the agency or prosecutor upon proper request made in compliance with applicable law and procedure.

(e) This section does not infringe on or impair the confidentiality of information considered to be confidential by law, whether it be constitutional, statutory, or by judicial decision, including information excepted from the requirements of Section 552.021.

Gov't Code § 552.135. Because the legislature limited the protection of section 552.135 to the identity of a person who reports a possible violation of "law," a school district that seeks to withhold information under that exception must clearly identify to this office the specific civil, criminal, or regulatory law that is alleged to have been violated. *See* Gov't Code § 552.301(e)(1)(A). You indicate that the conduct reported to the school district relates to a possible violation of the regulatory law codified in Title 19, chapter 247 of the Texas Administrative Code regarding the educator's code of ethics. Based on your argument and our review of the information, we agree that the school district must withhold the portion of the submitted information that would substantially reveal the identity of the informer under section 552.135 of the Government Code. Accordingly, the school district must withhold the information we have marked under section 552.135 of the Government Code.

We next consider the third request, dated July 19, 2001. You argue that the minutes of the closed Board hearing are confidential under section 551.104(c) of the Government Code. However, you have not presented any arguments against the release of the remaining portion of the requested information ("all documents created on or after 6-4-01"), nor have you submitted any such information to this office. Because you have not submitted the remainder of the responsive information, we have no basis for determining whether a compelling reason exists for withholding it. Thus, we have no choice but to order that portion of the information released pursuant to section 552.302. If you believe the information is confidential and may not lawfully be released, you must challenge the ruling in court as outlined below. Again, we caution that the distribution of confidential information constitutes a criminal offense. *See* Gov't Code § 552.352.

Section 552.101 of the Government Code excepts from disclosure information deemed confidential by law. You inform us that the grievance hearing was closed, as authorized by the district Board of Education policy (DGBA (Local)) and section 551.074 of the Government Code. You argue that the stenographic record and audio tape recording of the closed hearing are made confidential under the Open Meetings Act (the "OMA"), Chapter 551 of the Government Code.

A governmental body that conducts a closed meeting must keep either a certified agenda or make a tape recording of the proceeding, except for private attorney consultations. Gov't Code §551.103. The agenda or tape is kept as potential evidence in litigation involving an alleged violation of the OMA. *See* Attorney General Opinion JM-840 (1988). Section 551.104(c) of the Government Code provides that "[t]he certified agenda or tape of a closed meeting is available for public inspection and copying *only under a court order issued under Subsection (b)(3).*" (Emphasis added.) Section 551.146 penalizes the unlawful disclosure of a certified agenda or tape recording of a lawfully closed meeting as a Class B misdemeanor, and makes the person responsible for disclosure liable for damages to a person injured or damaged by the disclosure. Thus, such information cannot be released to a member of the public in response to an open records request. *See* Open Records Decision No. 495 (1988). The district must withhold the requested stenographic record and audio recording from public disclosure under section 552.101 of the Government Code in conjunction with section 551.104(c) of the Government Code.

Thus, we conclude that the information which we have marked that is responsive to the requests dated April 20, 2001 (marked "Received May 2 2001") and May 2, 2001 (marked "Received June 5 2001") must be withheld from public disclosure under section 552.135. The district must withhold the record of the closed Board meeting pursuant to the Open Meetings Act. The remainder of the responsive information must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for

contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in cursive script, appearing to read "Cindy Nettles".

Cindy Nettles
Assistant Attorney General
Open Records Division

CN/seg

Ref: ID# 152304

Encl. Submitted documents

cc: Mr. Tom Purcell
5333 Fossil Creek Boulevard #513
Haltom City, Texas 76137
(w/o enclosures)